FILED
OCT 17, 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

CARL V. LYON
FRVR Corporation
1101 30th Street, N.W.
Washington, D.C. 20007
(202) 338-9022

STEPHEN M. OLSON
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 355-6500

JOHN M. NANNES
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 New York Avenue
Washington, D.C. 20005
(202) 371-7000
Attorneys for FRVR Corporation

October 17, 1988

RALPH J. MOORE, JR.*
RICHARD M. WYNER
D. EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

JAMES P. DALEY
STUART F. GASSNER
Chicago & North Western Transportation Company
One North Western Center
Chicago, Illinois 60606
(312) 559-6100
Attorneys for Chicago & North Western Transportation Company

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Do federal courts have jurisdiction under the Railway Labor Act to determine that carrier actions challenged by rail labor as departures from the "status quo" are not authorized under existing labor agreements, even though the Act commits all disputes over the interpretation or application of labor agreements to mandatory arbitration by adjustment boards, whose jurisdiction over such disputes is exclusive?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	11
ARGUMENT	13
I. THIS CASE DOES NOT WARRANT REVIEW ON ITS OWN MERITS	13
A. The Standard Challenged by RLEA Is Plainly Correct	14
B. There Is No Conflict Among The Circuits	19
II. THIS CASE DOES NOT MERIT REVIEW SIMPLY BECAUSE OTHER LINE SALE CASES ARE PENDING BEFORE THE COURT	22
A. This Case Is Legally and Factually Unrelated To the Other Pending Cases	22
B. The Petition Should Be Disposed of Promptly, Not Held In Abeyance Pending Decisions In the Other Unrelated Line Sale Cases	25
CONCLUSION	27

TABLE OF AUTHORITIES

Cases: Page

Adickes v. *Kress & Co.*, 398 U.S. 144 (1970) 14
Air Line Pilots Ass'n v. *Eastern Air Lines*, Nos. 88-7201 - 7204 (D.C. Cir. Sept. 30, 1988) 21
Andrews v. *Louisville & N. R. Co.*, 406 U.S. 320 (1972) 15, 17
AT&T Technologies v. *Communications Workers*, 475 U.S. 643 (1986) 16
Baker v. *United Transp. Union*, 455 F.2d 149 (3d Cir. 1971) 20
Brotherhood of Maintenance of Way Employees v. *Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986) 20
Burlington Northern R.R. v. *United Transp. Union*, 848 F.2d 856 (8th Cir. 1988) 21
Decker v. *CSX Transp. Inc.*, 688 F. Supp. 98 (W.D.N.Y. 1988), *appeal pending sub nom. CSX Transp., Inc.* v. *United Transp. Union*, No. 88-7461 (2d Cir.) 21
Elgin, J. & E. R. Co. v. *Burley*, 325 U.S. 711 (1945) 2, 8
Ex Parte No. 392, Class Exemption for the Acquisition & Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), *aff'd mem. sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987) 5
First National Maintenance Corp. v. *NLRB*, 452 U.S. 666 (1981) 6, 24
FRVR Corp.—Exemption—Acquisition & Operation—Certain Lines of Chicago & N.W. Transp. Co., ICC Finance Docket No. 31205 (served Jan. 29, 1988), *appeal pending sub nom. RLEA* v. *ICC*, No. 88-1280 (8th Cir.) 5, 11, 26
Gateway Coal Co. v. *Mine Workers*, 414 U.S. 368 (1974) 16
Locomotive Engineers v. *Louisville & N. R. Co.*, 373 U.S. 33 (1963) 15, 17
Locomotive Engineers v. *M.-K.-T. R. Co.*, 363 U.S. 528 (1960) 9

TABLE OF AUTHORITIES—Continued

Page

Maine Central R.R. v. *United Transp. Union*, 787 F.2d 780 (1st Cir.), *cert. denied*, 479 U.S. 848 (1986) 16
Order of Conductors v. *Pitney*, 326 U.S. 561 (1946) 17, 18, 19
Paperworkers v. *Misco*, 108 S.Ct. 364 (1987) 16
Railway Clerks v. *Florida E.C. R. Co.*, 384 U.S. 238 (1966) 7
Railroad Trainmen v. *Terminal Co.*, 394 U.S. 369 (1969) 6
REA Express, Inc. v. *Brotherhood of Ry., Airline & S.S. Clerks*, 459 F.2d 226 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972) 20
RLEA v. *Boston & Maine Corp.*, 808 F.2d 150 (1st Cir. 1986), *cert. denied*, 108 S.Ct. 102 (1987) 20
RLEA v. *Chicago & N.W. Transp. Co.*, 848 F.2d 102 (9th Cir. 1988), *petition for certiorari pending*, No. 87-2049 ..... 22, 25
RLEA v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *petitions for certiorari pending*, Nos. 87-1888 & 88-217 ..... 20, 22, 24
Rutland Ry. v. *Brotherhood of Loc. Engineers*, 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963) 20
Shore Line v. *Transportation Union*, 396 U.S. 142
Slocum v. *Delaware L.&W. R. Co.*, 339 U.S. 239 (1969) 2, 7, 18, 19
(1950) 15, 17
Steelworkers v. *Warrior & Gulf Co.*, 363 U.S. 574 (1960) 16
Telegraphers v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960) 20
Trainmen v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957) 3, 8, 17
Transportation Union v. *U.P.R. Co.*, 385 U.S. 157 (1966) 15, 17
Union Pacific R. Co. v. *Sheehan*, 439 U.S. 89 (1978) 11, 13, 15

TABLE OF AUTHORITIES—Continued

Page

United Industrial Workers v. *Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965) 21
United Transp. Union v. *St. Paul Union Depot Co.*, 434 F.2d 220 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971) 20

Statutes:

Railway Labor Act:

Section 2 Seventh, 45 U.S.C. § 152 Seventh.....2, 7, 14
Section 3, 45 U.S.C. § 153 .....2, 8, 17
Section 3 First (i), 45 U.S.C. § 153 First (i).... 8, 14
Section 5 First, 4 5U.S.C. § 155 First 5, 33
Section 6, 45 U.S.C. § 156 .....2, 7, 14, 18
Section 201, 45 U.S.C. § 181 16
Section 204, 45 U.S.C. § 184..... 16

National Labor Relations Act, 29 U.S.C. §§ 151-169 16
28 U.S.C. § 2342..... 8
49 U.S.C. § 10901 5

Miscellaneous:

Appendix to the Budget of the United States Government, FY 1987 (1986) 17
Appendix to the Budget of the United States Government, FY 1988 (1987) 17
Appendix to the Budget of the United States Government, FY 1989 (1988) 17
United States Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1988* (1988) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-464

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Chicago & North Western Transportation Company ("C&NW") and FRVR Corporation ("FRVR")[1] respectfully request that the petition for certiorari be denied.

STATEMENT OF THE CASE

Petitioner Railway Labor Executives' Association ("RLEA") seeks review of the question whether federal

---

[1] Respondents' Statement under Rule 28.1 appears as Appendix 1 to Respondents' Opposition to Petitioner's Emergency Motion for a Stay of the Strike Injunction or for An Injunction to Prohibit the Line Sale Pending Petition for A Writ of Certiorari, filed September 21, 1988.

courts have jurisdiction under the Railway Labor Act ("RLA") to determine the merits of a dispute as to whether a carrier's actions challenged by rail labor as alleged departures from the "status quo" are in fact authorized under existing collective bargaining agreements, even though § 3 of the RLA commits all "minor" disputes over the "interpretation or application" of collective bargaining agreements to mandatory arbitration.[2] (Petition for Certiorari ["Pet."] at i). RLEA and its member unions, by a strike threat and an action for a "status quo" injunction under the RLA, challenge C&NW's right to abolish jobs on certain rail lines that it plans to cease operating and to sell to FRVR. RLEA contends that the abolishments are not authorized by the existing labor agreements and thus will change the status quo in working conditions on the C&NW and give rise to a "major dispute" under §§ 2 Seventh and 6 of the RLA.[3] C&NW contends that it *does* have the right to implement the abolishments under existing agreements, and that RLEA's contrary claim gives rise to a minor dispute as to the proper "interpretation or application" of the agreements.

The court of appeals, analyzing the particular agreements in this case under a standard unanimously accepted by all ten courts of appeals that have considered the question, found that C&NW's position is at least "ar-

---

[2] 45 U.S.C. § 153 First (i); see *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 723-25 (1945).

[3] "Major" disputes concern intended changes in collective bargaining agreements. *Elgin, supra*, 325 U.S. at 723. They arise under § 2 Seventh, 45 U.S.C. § 152 Seventh, when a carrier attempts a unilateral change in "the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements," or under § 6, 45 U.S.C. § 156, when either party serves a formal notice seeking negotiations over "an intended change in agreements." While a major dispute is pending the "rates of pay, rules, and working conditions" must be maintained unchanged until the parties have exhausted the RLA's negotiation and mediation procedures. *Shore Line* v. *Transportation Union*, 396 U.S. 142 (1969).

guable" and not "obviously insubstantial" and that the question whether the abolishments will change the status quo thus depends on the correct "interpretation or application" of those agreements. The court therefore held that the case raised only an arbitrable minor dispute over which strikes are illegal and enjoinable.[4] RLEA now seeks review of that unexceptional application of firmly-settled law to the particular facts in this case. The decision below does not present any question of the relationship between the RLA and the Interstate Commerce Act.

The case concerns the effects on C&NW employees of the proposed sale to FRVR by C&NW of the "Duck Creek South" lines, 208 miles of track in Wisconsin, out of nearly 7,000 miles of railroad operated by C&NW. Consummation of the sale was originally scheduled for March 1988, and C&NW anticipated that it would abolish approximately 329 C&NW jobs on the line upon consummation. Virtually all the affected employees would continue to be able to hold railroad jobs, however, because FRVR agreed to give them a right of first hire to the approximately 200 jobs it will have on the line, and C&NW had nearly 200 vacant positions elsewhere that these employees could also fill. (Supp. App. at 120-21, 2; Affidavit of Stephen P. Selby, p. 2; Pet. at 5.)[5]

C&NW's existing labor agreements contain force-reduction provisions and seniority rules that apply to the proposed job abolishments. Under these agreements, C&NW is required to give advance notice, the length of which depends on the craft affected, before abolishing jobs, and to allow employees displaced by job abolishments to move to other C&NW jobs that their seniority

---

[4] *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957).

[5] "Supp. App." citations refer to C&NW's Supplemental Appendix before the Seventh Circuit. The affidavits cited in this Brief were filed in the Northern District of Illinois in support of C&NW's motion for a preliminary injunction against RLEA's threatened strike over the proposed job abolishments.

entitles them to hold. If the C&NW complies with these requirements, it is free to abolish jobs for any reason whatever, without restriction. (Supp. App. at 1, 2, 11-36).

C&NW has exercised its rights under its force-reduction agreements repeatedly over the past 20 years. During that period it has nearly halved the number of miles of track it operates, primarily through line abandonments, and has abolished all C&NW jobs along the lines it has ceased to operate. (Pet. at 3). Since 1981, it has reduced its work force by 41 percent, abolishing nearly 6,000 jobs in conjunction with the discontinuance of operation of lines and numerous other measures increasing productivity.[6] Most of those were union jobs, and in each such instance C&NW effected the job abolishments under the force-reduction provisions of its agreements, without prior RLA bargaining with its unions. No union ever challenged C&NW's right to do so until 1986. (Supp. App. at 3, 86-87, 103-105, 121).

When C&NW advised its unions of the proposed Duck Creek South sale in late 1987, the unions responded by serving notices, ostensibly under § 6 of the RLA, seeking to lengthen the notice requirements, modify application of the seniority rules, and add to allowances and other protective arrangements under the parties' existing agreements for employees affected by the sale to FRVR. Although C&NW took the position that under the Interstate Commerce Act the union notices were not mandatorily bargainable,[7] it engaged in voluntary negotiations

---

[6] This shrinkage in employment is characteristic of the railroad industry generally, in which employment has declined by 52 percent since 1970. United States Dep't of Commerce, Bureau of the Census, *Statistical Abstract of the United States 1988* at 570, Table No. 978 (1988).

[7] The sale was subject to approval by the Interstate Commerce Commission, which also has jurisdiction to prescribe and impose

with the unions without prejudice to its position as to the validity of the notices. In January 1988, in an attempt to end the dispute, C&NW offered $30,000 in separation pay to any employee who is unable to continue to hold a railroad job, either with FRVR or C&NW, as a result of the sale. RLEA rejected that offer, however, and negotiations continue.[8] (Supp. App. at 7-10, 112, 118-19.)

In December 1987, FRVR and C&NW obtained authority from the Interstate Commerce Commission to consummate the Duck Creek South sale under the Interstate Commerce Act and the 7-day notice provision of *Ex Parte No. 392, Class Exemption for the Acquisition & Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *aff'd mem. sub nom. Illinois Commerce Comm'n* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987).[9] RLEA then threatened to strike, claiming that the job abolishments would constitute a change in the "status quo," although the unions have not exhausted major dispute procedures with respect to their proposals to change

---

protective benefits for employees affected by the sale. 49 U.S.C. § 10901. C&NW takes the position that the Interstate Commerce Act supersedes any obligation that the carrier would otherwise have under the Railway Labor Act to bargain over the effects of the sale on employees. That question is not presented in this case.

[8] C&NW recently invoked the services of the National Mediation Board under § 5 First of the Railway Labor Act, 45 U.S.C. § 155 First, with respect to the dispute over the union notices, again without prejudice to its position that bargaining over those notices is not mandatory. See Supplemental Brief of Petitioners at 6-7.

[9] See *FRVR Corp.—Exemption—Acquisition & Operation—Certain Lines of Chicago & N.W. Transp. Co.*, ICC Finance Docket No. 31205 (served Jan. 29, 1988), *appeal pending sub nom. RLEA* v. *ICC*, No. 88-1280 (8th Cir.), reproduced as Appendix A to this Brief.

the existing rules.[10] C&NW sought a preliminary injunction against the strike in the Northern District of Illinois, and RLEA moved to enjoin the job abolishments.[11]

---

[10] Those procedures have been summarized by this Court as follows:

> "The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10." *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969).

[11] The cross-motions were filed in an action already on file in which C&NW sought declaratory relief with respect to the parties' controversy, and in which RLEA had counterclaimed with respect to its status quo contentions.

RLEA's motion sought "an order directing the North Western to maintain the status quo * * *." (Defendants-Counterplaintiffs' Cross-Motion for Preliminary Injunctive Relief at 1). It explained in its moving papers that the alleged departure from the status quo it sought to enjoin was C&NW's plan to "eliminate work", *i.e.* abolish jobs, on the Duck Creek South lines. (Defendants' Reply to Plaintiffs' Opposition to its Motion for Preliminary Injunctive Relief, at 9). C&NW's decision to sell the lines, as RLEA conceded, is a matter of managerial prerogative under the Court's decision in *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), but RLEA contended that C&NW was obliged to bargain with the unions before taking any action that would affect employees. (Defendants' Memorandum of Points and Authorities In Support of their Cross-Motion for Preliminary Injunctive Relief, at 10). The

In support of its motion, and as a defense to C&NW's motion to enjoin the strike, RLEA claimed that the proposed abolishments under the force-reduction agreements would be a unilateral change by C&NW in the status quo in violation of RLA major dispute provisions, §§ 2 Seventh and 6.[12] Under those provisions, carriers cannot make changes in working conditions, except as authorized under existing agreements, without first exhausting the "long and drawn out," "almost interminable" RLA major dispute procedures.[13] As RLEA conceded below, however, carriers remain free to exercise existing contractual rights pending exhaustion of major dispute procedures.[14]

C&NW responded that it has the right under its existing agreements and past practices to abolish the jobs, that its established right to do so is part of the "status quo," and that a carrier does not lose its contract rights simply because a union serves a notice proposing to change the contracts. Therefore, C&NW contended, RLEA's claim that the proposed job abolishments would change the "status quo" challenges the carrier's right to abolish the jobs under its existing agreements, and any such challenge necessarily raises a dispute over the "in-

---

"effects" RLEA identified—elimination of work opportunities on Duck Creek South lines and the resulting contraction of employees' seniority options—all derive from the proposed job abolishments.

[12] 45 U.S.C. §§ 152 Seventh and 156.

[13] *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966); *Shore Line, supra*, 396 U.S. at 149, 153-54.

[14] Pet. at 13a. RLEA conceded that under existing agreements C&NW has "the right * * * to abolish jobs when the work to be performed by those positions is no longer there" and that "unless appellee C&NW and rail labor reach an agreement to modify existing seniority provisions in the current agreements, those provisions will govern the continued employment rights of the affected employees" in the Duck Creek South sale. (Brief for Appellants Railway Labor Executives' Association, *et al.*, before the Seventh Circuit, at 32-33).

terpretation or application" of the agreements, *i.e.*, a "minor dispute" subject to § 3 of the RLA.[15] Under § 3, RLA arbitration boards, not courts, have exclusive jurisdiction to determine disputes over the "interpretation or application" of agreements, 45 U.S.C. § 153 First (i), and strikes over such disputes are unlawful and enjoinable.[16] The district court agreed with C&NW; it granted a preliminary injunction against the threatened strike and denied the injunction sought by RLEA against the proposed job abolishments.[17] (Pet. at 26a-28a).

The Seventh Circuit affirmed, relying solely on the RLA, and found it unnecessary to "resolve the additional issues, raised by the district court's opinion and addressed in the arguments of the parties, with regard to the effect of the Interstate Commerce Act" on the parties' rights. (Pet. at 21a). The court of appeals acknowledged that the unions had served so-called § 6 notices seeking to negotiate new labor agreements governing job abolishments in connection with the Duck Creek South sale, and that under § 6 the court "may enjoin both the rail carrier and the union(s) from altering the status quo during the course of the negotiations and other impasse resolu-

---

[15] See *Elgin, supra*, 325 U.S. at 723-28.

[16] See *Trainmen* v. *Chicago R. & I. R. Co., supra*, holding that strikes over minor disputes are unlawful because they are incompatible with the dispute resolution procedure prescribed by Congress and are enjoinable notwithstanding the Norris-LaGuardia Act. 353 U.S. at 42.

On March 4, 1988, C&NW submitted the dispute to the National Railroad Adjustment Board under § 3 of the RLA, seeking arbitration of, *inter alia*, the question whether the carrier has the right under its existing agreements and its past practices thereunder to abolish the Duck Creek South jobs. (Supp. App. at 84).

[17] The district court also accepted C&NW's alternative argument that the injunction RLEA sought would violate the Hobbs Administrative Orders Review Act, 28 U.S.C. § 2342, since the ICC's order, reviewable only in the courts of appeals, had authorized the sale without additional labor protection.

tion procedures * * *." (*Id.* at 4a, 12a, 19a). The court noted, however, that, as RLEA had conceded, C&NW's existing agreements, "unless changed, will continue to govern the employment-related rights of the current C&NW employees who will be affected by the Duck Creek South line sale." (*Id.* at 13a). Therefore, the court had only to decide whether the proposed abolishments would be a "departure" from existing agreements. (*Id.* at 9a). Under well-established principles, a dispute over proposed action by a rail carrier is deemed to be minor so long as the challenged action is "arguably comprehended" by the agreements, express or implied; *i.e.*, "the dispute is minor unless the [railroad's] claims of contractual justification are 'frivolous' or 'obviously insubstantial.'" (*Id.* at 9a, 10a-11a, 16a) (citations omitted).

Applying that firmly-settled standard to C&NW's agreements and its particular history of job abolishments under those agreements, which the court had "carefully evaluated," the court of appeals concluded:

> "There can be no doubt that the agreements and past practice arising thereunder embrace matters of job abolishment, layoff, and reassignment resulting from a layoff with regard to the individuals affected by the Duck Creek South line sale who are able to retain their employment with C&NW. In addition, C&NW's claim that the agreements and attendant past practices extend to the related matters of its obligation to employees who are laid off after their positions are abolished appears to have at least some factual support." (*Id.* at 14a).

Thus, the court of appeals held on the particular facts of this case that RLEA's challenge to the carrier's right to implement job abolishments presented an arbitrable minor dispute. (*Id.* at 14a-16a). The court accordingly held that a strike to prevent those abolishments was unlawful, and that since minor disputes fall within the exclusive jurisdiction of the adjustment boards the dis-

trict court was without jurisdiction to grant the broad "status quo" injunction sought by RLEA under the major dispute provisions of the RLA. (*Id.* at 17a-19a, 20a). The court further stated that under this Court's decision in *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528 (1960), the district court could have conditioned the strike injunction on "C&NW's abstention from consummating the Duck Creek South Line sale" if RLEA had demonstrated that employees would otherwise suffer irreparable harm pending proceedings before the adjustment board. The court of appeals held, however, that there was no basis for a claim of irreparable injury to employees here because the adjustment board can "make those employees whole" if it ultimately rules in the unions' favor. (*Id.* at 20a-21a).

On September 2, 1988, RLEA moved the court of appeals for either a stay of the strike injunction or an injunction against the sale pending certiorari, claiming that the case is "related" to other line sale cases before this Court which present questions as to the effect of the Interstate Commerce Act on the application of the RLA. The court of appeals denied the motion, noting that none of the other line sale cases before this Court "involve a claim by the carrier, that its actions in abolishing jobs were permitted under existing labor agreements." The court further determined that C&NW and FRVR "would suffer substantial hardship" if the line sale was delayed because that "could jeopardize" the sale, whereas employees will not be irreparably harmed by the sale.[18]

RLEA then filed a petition for certiorari. On September 21, Justice Stevens stayed the preliminary injunction against the threatened strike. In the face of the renewed strike threat, C&NW and FRVR have postponed consummation of the sale, although each additional day of post-

---

[18] The decision of the Seventh Circuit denying the stay is reproduced as Appendix B to this Brief at pages 21a-23a.

ponement threatens the ultimate survival of the Duck Creek South lines.[19]

SUMMARY OF ARGUMENT

When considered on its own merits, this case plainly does not warrant review by this Court. The standard that the court of appeals used to determine that RLEA's challenge to C&NW's right to abolish jobs in connection with the Duck Creek South sale is an arbitrable minor dispute over which strikes are unlawful—*i.e.*, whether C&NW's claim of contractual authorization under its existing labor agreements is at least "arguable"—is accepted by *every* court of appeals that has ever addressed the question, as RLEA concedes (Pet. at 19). RLEA did not challenge that standard below, which is sufficient basis for denying review. In any case, the standard is clearly correct and neither the Act nor applicable decisions of this Court can support any other rule. The standard urged by RLEA would empower the federal courts to determine the merits of disputes over the interpretation or application of labor agreements. Such a result would give unions the option of transferring the forum for resolving such disputes, which number in the thousands each year, from the various adjustment boards to the courts—contrary to what this Court has recognized as the manifest intent of Congress to keep these disputes "out of the courts."[20] This Court should not grant review to decide whether the lower federal courts have repeatedly and unanimously erred for years in identifying minor disputes by a test that is mandated by the RLA and applicable Supreme Court precedent, and has

---

[19] The ICC found that "FRVR stands a far better chance of developing a self-sustaining rail operation [on the Duck Creek South lines] than does C&NW," and that unless the lines are sold there is a significant "potential of future abandonment." *FRVR Corp.*, (App. A at 16a).

[20] *Union Pacific R. Co.* v. *Sheehan*, 439 U.S. 89, 94 (1978).

proven workable and acceptable to management and, until now, to labor as well.

RLEA contends, however, that certiorari should be granted in this case primarily because, according to RLEA, it is "inextricably entwined" with three other railroad line sale cases now pending before this Court that present the question whether the Interstate Commerce Act supersedes any obligation that a selling carrier might otherwise have under the RLA to bargain over the effects of a sale on employees. (Pet. at 11). That contention is baseless. The court of appeals in this case expressly declined to reach any Interstate Commerce Act questions, holding instead that, even if the RLA's bargaining procedures were applicable, as RLEA contends in the other pending line sale cases, on the particular facts of *this* case RLEA would still not be entitled to enjoin the Duck Creek South job abolishments or to block them by striking. (Pet. at 20a n.4, 21a). Thus, the issues here are entirely unrelated to and independent of the Interstate Commerce Act question in the other pending cases; the ultimate disposition of the other cases *cannot* affect the ground upon which this case was decided, and vice-versa. This Court can and should, therefore, dispose of the petition in this case without awaiting decisions on the petitions or on the merits of the other cases. That is particularly urgent in view of Justice Stevens's stay of the strike injunction pending consideration of the petition here, which if continued will effectively prevent consummation of the sale and threaten to jeopardize it and the ultimate survival of the Duck Creek South lines.

ARGUMENT

I. THIS CASE DOES NOT WARRANT REVIEW ON ITS OWN MERITS

The decision below rests on an unremarkable application of a fundamental principle of RLA law, and indeed, of federal labor law generally: arbitrators, not courts, have jurisdiction to resolve disputes over the proper interpretation or application of collective bargaining agreements. Such disputes "arise daily," as this Court has recognized,[21] in a variety of ways. Indeed, they commonly arise just as the dispute in this case did: a carrier proposes to take an action affecting employees that it believes is authorized under its existing labor agreements. Rail labor, resisting the change, claims that it is an unauthorized departure from the status quo in working conditions and gives rise to a major dispute, or serves a § 6 notice seeking to change the agreements on which the carrier relies, and either sues for a status quo injunction or threatens to strike to prevent the alleged status quo violation—or both, as RLEA did here. The question presented to the Court in this case is how the lower courts are to treat disputes over the interpretation of collective bargaining agreements when they arise in such status quo cases.

Just last summer, RLEA advised the Court in another case that the "legal standards to be followed" in distinguishing minor disputes from justiciable status quo claims "are well known and the Third Circuit * * * correctly discusse[d] such legal standards" when it said that "[i]f the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial,' the controversy is [a minor dis-

---

[21] *Union Pacific R. Co.* v. *Sheehan*, *supra*, 439 U.S. at 94.

pute] within the exclusive province of the National Railroad Adjustment Board." [22] The court of appeals in this case followed precisely that standard, but having lost below, RLEA now seeks to have the standard itself reviewed by this Court. RLEA never challenged that standard below, and therefore is barred from doing so here.[23] In any case, review of the decision below is unwarranted, because it is clearly correct. Indeed, neither the RLA nor relevant decisions of this Court would permit any other result, and therefore, not surprisingly, there is no conflict among the circuits on the question presented.

A. The Standard Challenged by RLEA Is Plainly Correct

The court of appeals rejected RLEA's claim that C&NW's proposed job abolishments would violate the "status quo" and give rise to a major dispute under either § 2 Seventh or § 6 of the RLA because it found that C&NW had an "arguable" claim that the existing agreements authorize the abolishments, applying the rule that in status quo cases "the federal courts must delineate a matter a minor dispute unless the carrier's claims of contractual justification" are "frivolous or obviously insubstantial * * *." (Pet. at 16a) (citations omitted). That holding was clearly correct.

Section 3 of the RLA gives adjustment boards jurisdiction to resolve disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *." 45 U.S.C. § 153 First (i). This Court has held

---

[22] Brief for the Respondents in Opposition at 6, A-9 in *Consolidated Rail Corp.* v. *RLEA*, No. 88-1 (certiorari granted, Oct. 3, 1988).

[23] See, *e.g.*, *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

repeatedly that the adjustment boards' jurisdiction is "exclusive."[24] As the Court has said,

> "Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. *Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts.*" *Union Pacific R. Co.* v. *Sheehan, supra*, 439 U.S. at 94 (citations omitted; emphasis added).

The statutory exclusivity of the adjustment boards' jurisdiction compels the standard applied by the court below in determining whether a dispute is minor. Where a carrier's claim that a challenged unilateral action is justified by its labor agreements is at least "arguable," the case plainly turns on a genuine issue as to the proper "interpretation or application" of the agreements. Resolving such questions is the province of the adjustment boards, not the courts. Hence, a court must end its inquiry when it determines that a carrier's claim of contractual justification is arguably correct. To look into the merits of the issue further—to "examine the merits of a rail carrier's reliance on collective bargaining agreements and past practices," as RLEA urges (Pet. at i)—would usurp the boards' jurisdiction.[25]

---

[24] *E.g., Andrews* v. *Louisville & N. R. Co.*, 406 U.S. 320, 325 (1972); *Transportation Union* v. *U.P.R. Co.*, 385 U.S. 157, 160, 164 (1966); *Locomotive Engineers* v. *Louisville & N. R. Co.*, 373 U.S. 33, 38 (1963); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 244 (1950).

[25] The "court's role is limited to determining whether [the carrier's] assertion is 'even "arguable."' * * * [I]t is not for it to

Nonetheless, RLEA claims that courts can do just that in status quo cases. That is nothing less than a claim that the courts have concurrent jurisdiction over minor disputes. *Any* carrier action that a union believes is a violation of existing agreements can be challenged as a violation of the status quo under § 2 Seventh, or under § 6 if the union simply serves a § 6 notice proposing to restrict the carrier's rights. That happens in dozens of cases each year now, but under current law the courts are obliged to dismiss any that they deem to present minor disputes. Under RLEA's proposed rule any of the thousands of minor disputes that arise each year in the railroad and airline industries [26]—more than 5,000 each

---

weigh, and decide who has the better of the argument. If the court [does] this, it overstep[s] its bounds and usurp[s] the arbitrator's function." *Maine Central R.R.* v. *United Transp. Union*, 787 F.2d 780, 782 (1st Cir. 1986) (citations omitted).

That rule is consistent with this Court's view of the domain of labor arbitrators under the National Labor Relations Act. That Act does not require arbitration, it merely encourages private arbitration agreements for labor disputes. See *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 377 (1974). Nonetheless, because arbitration under the National Labor Relations Act serves, as under the RLA, as a means for preventing strikes by providing peaceful resolution procedures for labor disputes, the Court has recognized a "presumption of arbitrability": doubts as to whether a particular dispute falls within a private arbitration agreement must be "resolved in favor of coverage." *AT&T Technologies* v. *Communications Workers*, 475 U.S. 643, 650 (1986); *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582-83 (1960). The exclusive jurisdiction of labor arbitrators under the NLRA extends to all matters "even arguably" within the scope of collective bargaining agreements. *Paperworkers* v. *Misco*, 108 S. Ct. 364, 371 (1987). Hence, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* Statutory arbitration under the RLA should be entitled to no less judicial deference than voluntary arbitration under the National Labor Relations Act.

[26] Airlines are subject to the RLA and to minor dispute procedures under 45 U.S.C. §§ 181 and 184.

year in the railroad industry alone[27]—could be brought to the federal courts, which would be bound to rule on the merits of these disputes. There would be no principled way to screen out any such disputes from the courts. Labor would thus have an unrestricted option to sidestep arbitration, simply by suing a carrier for an alleged status quo violation, or threatening to strike and raising a status quo defense when the carrier comes to court for a strike injunction, as RLEA did in this case.

That result would be insupportable. It is irreconcilable both with the plain terms of § 3, and with all relevant decisions of this Court, including those cited by RLEA. In addition to numerous holdings that the adjustment boards have "exclusive" jurisdiction over minor disputes,[28] this Court has explicitly held that the Act cannot be read "to mean only that an Adjustment Board has been organized and that the parties are free to make use of its procedures if they wish to; but that there is no compulsion on either side to allow the Board to settle a dispute if an alternative remedy, such as resort to economic duress, seems more desirable." *Chicago R. & I., supra*, 353 U.S. at 34, 39. Rather, arbitration is "compulsory." *Id.* at 39. That holding is squarely in point, and squarely contrary to RLEA's contentions.

So is this Court's decision in *Order of Conductors* v. *Pitney*, 326 U.S. 561 (1946), which RLEA says

---

[27] *Appendix to the Budget of the United States Government, FY 1989*, at I-Z66 (1988) (6,610 new railroad arbitrations commenced in 1987); *Appendix to the Budget of the United States Government, FY 1988*, at I-Z64-65 (1987) (5,359 new railroad arbitrations commenced in 1986); *Appendix to the Budget of the United States Government, FY 1987*, at I-Z80 (1986) (8,414 new railroad arbitrations commenced in 1985).

[28] *Andrews* v. *Louisville & N. R. Co., supra*, 406 U.S. at 325; *Transportation Union* v. *U.P.R. Co., supra*, 385 U.S. at 160, 164; *Locomotive Engineers* v. *Louisville & N. R. Co., supra*, 373 U.S. at 38; *Slocum* v. *Delaware, L. & W. R. Co., supra*, 339 U.S. at 244.

merely "touched on" but did not "address the question of the scope of federal court jurisdiction." (Pet. at 22). *Pitney* not only "addressed" that question, it dictates precisely the approach to status quo claims that the Seventh Circuit employed in this case. In *Pitney* a union claimed that a carrier's proposal to displace certain employees from their jobs would be a unilateral change in the status quo in violation of § 6 of the RLA. The carrier's defense "put in issue the meaning of the contracts that allegedly embodied the working conditions which the [carrier was] about to change." 326 U.S. at 565. Thus, the lower court "had to interpret these contracts before it could find that § 6 had been violated." *Id.* But, the Court noted, Congress established the adjustment boards to interpret labor contracts, and "it also intended to leave a minimum responsibility to the courts." *Id.* at 566. This Court thus held that only "after the Adjustment Board acts, but not until then," could the lower court proceed to consider the union's status quo claim. *Id.* at 565-67.

This Court's decision in *Shore Line*, *supra*, on which RLEA relies, supports the same conclusion. To be sure, as RLEA points out, *Shore Line* held that the status quo that must be maintained while a § 6 notice is pending is not *limited* to existing agreements, but rather encompasses "the actual, objective working conditions out of which the dispute arose, irrespective of whether these conditions are covered in an existing [written] agreement." 396 U.S. at 143. But *Shore Line* did not hold, as RLEA now asserts, despite its own concessions below (Pet. at 13a), that the status quo does not *include* the carrier's rights under existing agreements, and that a union can defeat a carrier's established contractual rights simply by *proposing* to change them. On the contrary, *Shore Line* explicitly recognized that if the carrier had an established right to make the changes that the union challenged, that right would be "in reality a part of the actual working conditions" and the carrier would have

been free to make the changes during the § 6 status quo period. 396 U.S. at 153-54. The carrier claimed no such right under its written or implied agreements with the union in that case, and so the Court had no occasion to employ the "major-minor" classification—but it hardly rejected it, as RLEA claims. Instead, the Court explicitly reaffirmed the holding of *Pitney* that, where such a right is claimed, "the proper forum for interpreting the agreements [is] the Adjustment Board provided by Congress in the Railway Labor Act," not a federal court. *Id.* at 156-57.

In sum, the decision below is clearly correct. The result sought by RLEA would impose an intolerable burden on the federal courts, by substituting concurrent federal court jurisdiction for the adjustment boards' exclusive jurisdiction over thousands of minor disputes that arise each year. Reversal of the rule applied below would be irreconcilable with every relevant decision of this Court and the plain language of the Act.

B. There Is No Conflict Among The Circuits

Given the alternatives just outlined, it is not surprising that there is no conflict among the circuits on the standard for determining whether a claim that a carrier has violated the status quo gives rise to a major or minor dispute. The standard employed by the court below for assessing status quo claims, which turns on whether the carrier has an "arguable" contractual justification for its actions, is accepted by every court of appeals that has considered the question, in at least 50 cases, besides this one, in ten different circuits.[29]

---

[29] Appendix C to this Opposition (at 24a-28a) sets forth the citations to these cases. There are *no* contrary decisions, although the courts occasionally employ different phrases in formulating the standard. As the Eighth Circuit recently remarked:

> "This Court has said that a dispute is minor if the agreement is 'reasonably susceptible' of the interpretations sought by both

To be sure, other courts have held, on different facts, that job abolishments on other carriers gave rise to major disputes. But contrary to RLEA's claims (Pet. at 25-26), that does not create any conflict among the circuits on the law. Whether a dispute is major or minor depends on the particular facts and the nature of the agreements between the parties in each case. Different facts yield different results in different cases.[30] In cases presenting

---

the employer and the employees. Other courts have said that a dispute is minor if the employer's action can be arguably justified under the terms of the existing agreement * * *, or that the dispute is minor unless the employer's argument that its actions are within the contract is 'obviously insubstantial.' These locutions are essentially the same in their result." *Brotherhood of Maintenance of Way Employees* v. *Burlington Northern R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986) (citations omitted).

The courts of appeals also agree that under *Shore Line*, the status quo includes the carrier's established rights under existing agreements. *Baker* v. *United Transp. Union*, 455 F.2d 149, 157 (3d Cir. 1971) (To "freeze physical conditions in existence on the day [a] Section 6 notice was filed," depriving a carrier of a contractual right to make changes, would not be the "status quo"; it "would be the creation of a new condition."). Accord, *RLEA* v. *Boston & Maine Corp.*, 808 F.2d 150, 156 (1st Cir. 1986); *United Transp. Union* v. *St. Paul Union Depot*, 434 F.2d 220, 223 (8th Cir. 1970). See also *Rutland Ry.* v. *Brotherhood of Loc. Engineers*, 307 F.2d 21, 33-36 (2d Cir. 1962); *REA Express* v. *Brotherhood of Ry., Airline & S.S. Clerks*, 459 F.2d 226, 230-32 (5th Cir. 1972).

[30] All of the cases that RLEA claims are in direct conflict with the decision below are factually quite different from this one. In *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), as RLEA concedes, the carrier "did not argue * * * that the reduction in force provisions of its collective bargaining agreements with the Telegraphers authorized it to abolish jobs." (Pet. at 24). This Court, in fact, found it "impossible" to say that the case turned on conflicting "interpretations of the provisions of" an "existing collective bargaining agreement." 362 U.S. at 341. The same is true of *RLEA* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), *petitions for certiorari pending*, Nos. 87-1888 & 88-217. The carrier there did not contend that its agreements authorized the

facts similar to this one, the disputes have been deemed minor. For example, a recent District of Columbia Circuit opinion held that broad force-reduction provisions similar to those in C&NW's agreements and a past practice of unilateral job abolishments similar to C&NW's arguably justified a carrier's plan to abolish the jobs of over 3,000 employees in connection with its discontinuance of service on certain routes, and thus that a union challenge to those abolishments was a minor dispute. *Air Line Pilots Ass'n* v. *Eastern Air Lines*, Nos. 88-7201-7204 (D.C. Cir. Sept. 30, 1988). Similarly, in another rail line sale case where the selling carrier had force-reduction agreements virtually identical to C&NW's, the court held that the unions' challenge was a minor dispute and thus enjoined a threatened strike and refused to enjoin the sale. *Decker* v. *CSX Transp. Inc.*, 688 F. Supp. 98 (W.D.N.Y. 1988), *appeal pending sub nom.*

---

abolishments. In *United Industrial Workers* v. *Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965), the carrier did raise such a claim and the Fifth Circuit said, like the Seventh Circuit did in this case, that "if by its terms o[r] reasonable implication therefrom, the collective agreement apparently affords some arguable basis" for the carrier's action, the dispute "is not a § 6 situation and remains a minor dispute." *Id.* at 188. On the particular facts of that case, however, the court concluded that the carrier's actions there could not "even remotely be justified" under the agreement. *Id.* at 189. The Seventh Circuit held otherwise on the basis of the quite different facts here, employing the same legal standard as the Fifth Circuit.

Contrary to RLEA's assertion (Pet. at 27), the Eighth Circuit's decision in *Burlington Northern R.R.* v. *United Transp. Union*, 848 F.2d 856 (8th Cir. 1988), did not hold that the carrier's decision to dispose of a part of its line and abolish jobs gave rise to a major dispute. Quite the opposite: The Eighth Circuit held that the Interstate Commerce Act "supersedes the authority of the mandatory bargaining provisions of the RLA * * *." *Id.* at 862. The carrier's force-reduction agreements were not before the court.

CSX Transp., Inc. v. *United Transp. Union*, No. 88-7461 (2d Cir.).[31]

The point is that there is no conflict or dispute about the governing legal standard. *All* the decided court of appeals cases agree with the Seventh Circuit that a status quo claim gives rise only to a minor dispute if the carrier's contractual justification is at least "arguable," or not "frivolous" or "obviously insubstantial." (Pet. at 11a, 16a). As RLEA concedes, that has been settled law for at least "the past four decades." (Pet. at 19).

II. THIS CASE DOES NOT MERIT REVIEW SIMPLY BECAUSE OTHER LINE SALE CASES ARE PENDING BEFORE THE COURT

A. This Case Is Legally and Factually Unrelated To the Other Pending Cases

As we have just shown, this case, standing alone, could not possibly be deemed to merit review by this Court. Indeed, RLEA's primary proffered "reason for granting the writ" has nothing to do with the merits of this case. Rather, RLEA contends that certiorari should be granted because this case is supposedly "inextricably entwined" with three other railroad line sale cases now pending before the Court on petitions for certiorari, Nos. 88-217 and 87-1888, seeking review of *RLEA* v. *Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3d Cir. 1988), and No. 87-2049, seeking review of *RLEA* v. *Chicago & N.W. Transp. Co.*, 848 F.2d 102 (8th Cir. 1988). (Pet. at 11). The petitions for certiorari in those cases present, as RLEA has said, the question of "the relationship of the Railway Labor Act to the transportation statute." (Stay

---

[31] In *Decker*, the Second Circuit initially granted a stay similar to Justice Stevens's stay here, pending appeal of the district court's judgment, but when it heard oral arguments on the merits on July 18, 1988 it vacated the stay that same day.

Application at 10). Specifically, they present a conflict among the circuits over the question whether RLEA is free to seek additional labor protection in line sales through RLA collective bargaining, or whether the RLA is superseded in that regard by the Interstate Commerce Act's provision for the ICC to resolve labor protection disputes in line sales. (See Pet. at 13, 15).

In this case, by contrast, the court of appeals expressly declined to reach the Interstate Commerce Act "supersession" question, because the "Railway Labor Act and the attendant relevant case law provide[d] a full and proper basis for affirming the district court." (Pet. at 21a & n.6, 20a n.4). Indeed, RLEA itself is bound to concede that this case "differs" from the other cases because it was decided on an "alternative argument." (Pet. at 14; Stay Application at 11). The legal issues in this case are thus wholly independent of those presented in the other pending line sale cases.[32] The ultimate decision in this case will have no bearing on the merits of those cases, and the decisions in those cases will not affect the merits or outcome of this case.

RLEA contends, however, that the concededly "different" issues in this case must "for logical and practical reasons, be determined before this Court considers whether the Interstate Commerce Act supersedes the Railway Labor Act," because "the controversy over rail labor's bargaining rights" in line sales will not be put to rest "so long as some courts are holding that those rights are not implicated in such sales" even if the RLA is not superseded. (Pet. at 11, 14-15). That contention is specious. The court of appeals in this case did *not* hold that RLEA had no RLA "bargaining rights" with respect to labor protection in the Duck Creek South sale. Indeed, while the court of appeals noted that the unions had served

---

[32] Neither the "Questions Presented" nor the "Statutes Involved" sections of RLEA's petition so much as mentions the Interstate Commerce Act.

§ 6 notices seeking to negotiate for labor protection, it had no occasion to address the validity of those notices and did not do so.[33] (Pet. at 4a, 12a). In any case, the scope of an employer's bargaining obligation in connection with sales of parts of its business is settled by this Court's decision in *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), which held that the effects of such sales on employees are bargainable, while the sales themselves are not. RLEA never argued that C&NW's obligation under the RLA would be any broader, and C&NW never contended that it would be any narrower, if the RLA's major dispute procedures were not superseded by the Interstate Commerce Act. No question as to the scope of either RLEA's bargaining rights or C&NW's bargaining obligations under the RLA was before, or decided by, the court of appeals.

The only question that the court of appeals addressed was the scope of the "status quo" pending bargaining, given C&NW's claim that the force-reduction provisions in existing agreements authorize the abolishments, and RLEA's concession that those "contractual provisions, unless changed, will continue to govern" the sale's effects on employees. (Pet. at 13a). The court's holding on that question has no relevance to the other pending line sale cases before the Court. As the Seventh Circuit pointed out, neither the Third nor the Eighth Circuits addressed the minor dispute question that RLEA seeks to have this Court review in this case.[34] (App. B at 22a). Thus, this

---

[33] Moreover, as RLEA concedes, C&NW was bargaining over labor protection, even though it did not believe it was obliged to do so, before the court of appeals ruled, and has continued to bargain since the court ruled; indeed, it was C&NW that asked the National Mediation Board last month to mediate the parties' labor protection dispute under § 5 of the RLA. See n.8 *supra*.

[34] The carrier in the *Pittsburgh & Lake Erie* case did not contend that its labor agreements authorized it to abolish jobs in connection with the sale there. C&NW did raise such a claim as an alternative defense to RLEA's attempt to procure a status quo injunction in

Court's disposition of those cases will not have any "practical" effect on the result in this case, and the result in this case will not affect this Court's disposition of those cases. Whether or not rail labor is entitled to bargain for new labor protection agreements in line sales, some carriers, like the C&NW, may already have a right under existing agreements to abolish jobs in connection with sales, and others may not. But that fact has no bearing at all on the legal question whether the Interstate Commerce Act relieves all carriers of any obligation to bargain over future labor protection agreements for such sales, and carriers whose labor agreements differ from C&NW's will still be confronted with that question even though C&NW's particular agreements allowed the Seventh Circuit to avoid it in this case. There is, thus, no relationship, legal or practical, between this case and the other pending line sale cases.[35]

B. The Petition Should Be Disposed of Promptly, Not Held In Abeyance Pending Decisions In the Other Unrelated Line Sale Cases

Because this case is unrelated to the other pending cases, there is no reason for the Court to postpone disposition of the petition for certiorari pending disposition of the other cases. Doing so would threaten irreparable harm

---

the Eighth Circuit case, but neither the district court nor the Eighth Circuit reached the minor dispute argument because both disposed of the case on Interstate Commerce Act grounds.

[35] The Seventh Circuit's reliance on RLA minor dispute procedures would not be affected if this Court should hold that the major dispute procedures are superseded by the Interstate Commerce Act. The major dispute procedures conflict with the Interstate Commerce Act because they would authorize coercive bargaining and strikes over claims for future labor protection, while Congress has committed labor protection disputes in lines sales to peaceable resolution by the ICC. The minor dispute procedures, which provide peaceable means for resolving disputes over contract rights established prior to a line sale, raise no such conflict.

to C&NW and FRVR. So long as the stay of the strike injunction remains in effect, C&NW and FRVR cannot risk consummation of the sale. As the court of appeals found, "further delay could jeopardize the proposed sale." (App. B at 23a). That would threaten harm not only to C&NW and FRVR, but also to the long term viability of the Duck Creek South lines.

The ICC found last January that "FRVR stands a far better chance of developing a self-sustaining rail operation [on the Duck Creek South lines] than does C&NW," and that unless the lines are sold there is a significant "potential of future abandonment." (App. A at 16a). That conclusion was based in part on FRVR's ability to attract shippers for whose business C&NW has been unable to compete successfully. (*Id.* at 6a-7a). In late 1987, however, another regional railroad, the Wisconsin Central, commenced operations on former lines of the Soo Line Railroad parallel to the Duck Creek South lines. (*Id.*; see Affidavit of Dick Neu and his attached Verified Statement before the ICC at p. 5). While the Duck Creek South sale has been deferred pending this litigation, Wisconsin Central has had a substantial head start in seeking to enter into transportation contracts with shippers that FRVR hoped to serve. Each additional day of delay of the sale thus threatens erosion of FRVR's projected customer base, and ultimately threatens prospects for a viable railroad operation on the Duck Creek South route. The Court should therefore rule on the petition now, without awaiting results in the other, wholly independent and wholly different, cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CARL V. LYON
FRVR Corporation
1101 30th Street, N.W.
Washington, D.C. 20007
(202) 338-9022

STEPHEN M. OLSON
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 355-6500

JOHN M. NANNES
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 New York Avenue
Washington, D.C. 20005
(202) 371-7000
Attorneys for FRVR Corporation

October 17, 1988

RALPH J. MOORE, JR.*
RICHARD M. WYNER
D. EUGENIA LANGAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

JAMES P. DALEY
STUART F. GASSNER
Chicago & North Western Transportation Company
One North Western Center
Chicago, Illinois 60606
(312) 559-6100
Attorneys for Chicago & North Western Transportation Company

* Counsel of Record

APPENDICES

APPENDIX A

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 31205

FRVR CORPORATION—EXEMPTION ACQUISITION AND OPERATION—CERTAIN LINES OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—PETITION FOR CLARIFICATION

Decided: January 28, 1988

This decision is issued in response to a petition filed by the Chicago and North Western Transportation Company (CNW) and FRVR Corporation. FRVR is a new corporation formed for the purpose of acquiring and operating certain rail lines of the CNW. Petitioners seek a statement of this agency's views as to our jurisdiction over labor issues arising out of the formation of short-line railroads. The matter has become controversial in the past several years, due to the acceleration in the creation of regional and short-line railroads.

Since partial deregulation under the Staggers Rail Act of 1980 [1] nearly 200 short-line and regional railroads have come into existence—partially reversing the industry's long trend of exit and contraction. These new roads now operate approximately 13 thousand miles of rail lines with 4 thousand workers handling more than 1.3 million carloads yearly.

Up until the Staggers Act, the principal means of exit for large "Class I" railroads from unprofitable markets had been through abandonment. Substantial deregulation

---

[1] Pub. L. No. 96-448, 94 Stat. 1941-45.

of motor freight under the 1980 Motor Carrier Act [2] threatened to accelerate this trend through new and increasingly efficient truck competition. Abandonment, by its nature, is most often a painful, disappointing process. It normally entails the permanent loss of jobs and railroad service, even though it has not always occurred in markets that are inherently unserviceable by rail. Markets that produce losses when operated by Class I railroads can produce profits for smaller, more efficient local carriers. These new carriers are potentially beneficial to nearly all concerned. They preserve rail service for the local economies and provide traffic food for the larger carriers, enhancing employment prospects for rail labor—both on the smaller lines and throughout a reinvigorated Class I system—and they foster optimal recognition of the energy efficiencies and environmental benefits of rail service.[3]

The trend away from abandonment and towards the formation of short-line and regional carriers developed in response to the new business environment created by the Staggers Act. This development was given impetus by a change in 1982 in Commission labor protection policy which was in part based upon a provision of the Staggers Act which establishes a branch line sale process in which labor protection was foreclosed by the statute.[4] In the past, the typical sale of a short-line carrier might have been conditioned upon comprehensive (and poten-

---

[2] Pub. L .No. 96-296, 94 Stat. 793.

[3] The National Rail Transportation Policy charges the Commission with the responsibility of ensuring the development of a sound rail transportation system, while encouraging fair wages and safe and suitable working conditions for labor. The Commission is also to encourage and promote energy conservation. *See* 49 U.S.C. 10101a.

[4] 49 U.S.C. 10905. *See Simmons* v. *ICC*, 760 F.2d 126 (7th Cir. 1985).

tially quite expensive) labor protection.[5] By 1982 the Commission had determined that the expense of labor protection foreclosed short-line development, forcing the less attractive abandonment alternative or an abandonment and sale under the provisions of 49 U.S.C. 10905. As labor protection in short-line sales to new entrants is within the Commission's discretion, the Commission began to withhold protection in individual applications[6] on the three-part theory that (1) in doing so rail service would be preserved, (2) the new railroads provided the best prospect for protecting the employment prospects of the affected labor and (3) it made no sense to force railroads to go through the more cumbersome process of abandonment under 49 U.S.C. 10903 and sale under 49 U.S.C. 10905 to achieve the same result. After consideration of scores of individual applications, the Commission decided in a 1986 notice and comment rulemaking that the development of new small railroads was overwhelmingly beneficial and should be encouraged and allowed to proceed with a minimum of regulatory cost and delay.[7] The Commission issued rules exempting certain classes of line sales from drawn out Commission regulation, retaining for itself the unqualified right to re-

---

[5] *See e.g., Durango and Silverton Narrow Gauge Railroad Co.—Acquisition and Operation*, 363 I.C.C. 292 (1979), *aff'd sub nom. Railway Labor Executives' Association* v. *United States*, 697 F.2d 285 (10th Cir. 1983) (Review Board decision noting that imposition of labor protection was discretionary).

[6] *See Knox and Kane Railroad Co.—Gettysburg Railroad Co.—Petition for Exemption*, 366 I.C.C. 439 (1982).

[7] Ex Parte No. 392 (Sub No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, aff'd sub nom. Illinois Commerce Commission* v. *I.C.C.*, 817 F.2d 145 (DC Cir. 1987). This decision is in keeping with the National Transportation Policy of minimizing the need for Federal regulation (49 U.S.C. 10101a(2)), as well as the policies noted in footnote 3 above.

view and correct any unique problems that might arise out of exceptional circumstances.[8]

The Commission's policy has been validated by practical results. New railroad formation quickened,[9] abandonments fell,[10] service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved.[11] Most observers supported and welcomed

---

[8] The Staggers Act expanded the Commission's exemption authority. Further, as is stated in the Conference Report, the Commission is *actively* to pursue exemptions for transportation and is to have a policy of reviewing carrier actions *after the fact* to correct abuses. *See* H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 104-105.

[9]

New Railroad Formation

Year Est.	Number
1982	25
1983	20
1984	31
1985	28
1986	45
1987*	70

* Preliminary figure based on notices filed.

[10]

Miles of Lines Abandoned

Year	Miles
1982	5151
1983	2454
1984	3083
1985	2343
1986	2087
1987	1932

[11] The Commission's Office of Transportation Analysis is engaged in continuing study and research on the effect of the Commission's policy and the short-line/regional phenomenon. This study has included on-site interviews with labor and management, as well as data collection and analysis. This analysis demonstrates that employment on the new lines, particularly the larger regional carriers,

the Commission's policy initiative, but it has been consistently opposed by organized rail labor. Under the rules adopted in 1986, opposition to individual transactions is presented in petitions to revoke the grant of exemption. Such petitions have been filed in approximately 20 of the 120 transactions processed under the 1986 rules. Where petitions to revoke are filed, the Commission evaluates the basis for the revocation request, and has well-defined authority to correct any abuses that are shown.[12] The Commission's authority includes the power to impose labor protective conditions through partial revocation,[13] although under the rules this step will be taken only where exceptional circumstances are shown. The Commission would consider as exceptional, situations in which there was misuse of the Commission's rules or precedent,[14] or where existing contracts specified that line sales were subject to procedural or substantive protection.[15] Further, the exemption will be modified where labor can demonstrate injury that was unique, disproportionate to the gains achieved for the local transport

---

is typically drawn from the work force of the selling carrier. Further, while initial employment levels are below those of the departing carrier, employment on some lines has grown over time as improved service attracts new business to the lines.

[12] *See Consolidated Rail Corporation—Declaratory Order—Exemption*, 1 I.C.C.2d 895 (1986), *cited approvingly, G&T Terminal Packaging Co., Inc.* v. *Consolidated Rail Corp.*, CA 84-1173 Slip op. (D.N.J. October 23, 1986). *See also* legislative history of the Staggers Act in footnote 8 above.

[13] *See Maryland Midland Railway, Inc.—Exemption from 49 U.S.C. 11343 and 11301* (not printed), served January 6, 1987.

[14] *Cf.* Order of Investigation, served May 18, 1987, in F.D. No. 30965, *Delaware and Hudson Railway Company—Lease and Trackage Rights Exemption—Springfield Terminal Railway Company.*

[15] It is the Commission's standard labor protection policy in restructuring proceedings to preserve existing employment contracts insofar as possible, consistent with the merger, consolidation or abandonment authorized. *See* section 2 of the standard *New York Dock* conditions, 360 I.C.C. 84 (1979).

system, and which can be compensated without causing termination of the transaction or substantially undoing the prospective benefits of the Commission's existing policy for other communities and locales.[16]

The exemption proposal filed by CNW and FRVR corresponds quite well to our expectations and experience with the use of the Ex Parte 392 (Sub-No. 1) rules. At issue are 208 miles of light density lines in Eastern Wisconsin in the area between Green Bay and Milwaukee. The paper industry is the principal source of traffic and holds the greatest potential for traffic growth on the FRVR line. But to achieve growth means reversing the paper industry's increasing reliance on truck service. A verified statement filed by Petitioners indicates that rail market share of the outbound paper market was 54 percent of the total in 1977, but had fallen to under 20 percent by 1986. The number of motor carriers operating in the region has doubled and price competition is strenuous. The lines of the CNW may now be under additional pressure since its rail competition (which had been the Soo Line operating at relatively standard Class I costs) is a new regional operator, the Wisconsin Central. Wisconsin Central, as organized, has distinct cost advantages that will make long-term competition by CNW almost certainly impossible, absent a substantial improvement in efficiency and productivity.[17]

To work its way out of this predicament, CNW seeks to sell its line to the newly formed FRVR. FRVR has a management team drawn from the Wisconsin area and from within the rail industry, with experience in running a small railroad and marketing rail transportation

---

[16] *Cf. Northern Pacific Acquiring Corp. and Eureka Southern Railroad Co.—Exemption* F.D. 30555 (Decision served January 8, 1988).

[17] Two petitions to revoke the Wisconsin Coastal exemption (F.D. No. 31102) are now before the Commission.

to the paper industry. It intends to draw its work force from existing CNW employees where possible, and anticipates that it will operate as a union-represented company.[18] Its wages will be approximately 85 percent of the Class I standard, and its work rules will give it substantial productivity improvement over the CNW operations. The company also anticipates use of an incentive bonus plan to further productivity. It will own its own engines, operate its own facilities, and rely principally on the CNW for car supply. It has trackage rights over CNW to connect into Milwaukee, and it has connections with other roads at points on the system. The company has already contacted shippers along the lines, and it filed 25 shipper letters acknowledging anticipated support and cooperation with its petition.

CNW estimates that the impact of the sale on its employees will be minimized by FRVR's commitment to the use of former CNW employees. For its part, CNW states that it has employment shortages elsewhere on its system, and that it will make these jobs available to workers affected by the FRVR sale. It anticipates that approximately 20 employees might still be left without employment either on FRVR or the CNW. It has offered a commitment of $30,000 per employee as a separation allowance for any employee unable to secure continued employment with either CNW, by exercising seniority, or with FRVR, under the right of first hire.[19] CNW has offered to meet with its unions to discuss this offer and related issues. According to Petitioner, the unions believe that such discussions must proceed under the aus-

---

[18] Verified Statement of S. P. Selby. Selby states that CNW employees currently working on the affected lines are granted right of first hire selected in accordance with qualifications, work records, fitness and ability, and physical and medical standards. Selby states further that he has met with an officer of the Railway Labor Executive's Association to work out a suitable arrangement for union representation of future employees. V.S., at 3-4.

[19] Verified statement of Robert Schmiege.

pices of the Railway Labor Act (RLA).[20] Bargaining under the RLA requires maintenance of the status quo, and permits resort to strikes, lockouts or other form of self-help if an impasse cannot be mediated. CNW takes the position that such bargaining gives labor the power to defeat the FRVR transaction, and is not required. However, informal discussions have taken place, but no agreements have been reached.

CNW has petitioned for a declaration as to the Commission's view of its role in resolving any labor disputes which may arise in connection with the implementation of this Commission authorized transaction.[21] CNW asserts such an action is required to ensure a smooth implementation of the authorized transaction.

The Railway Labor Executives' Association (RLEA) has filed in opposition to the Petition of FRVR and CNW. RLEA believes that the Commission is without jurisdiction to issue the clarifying decision requested by Petitioners, and that Petitioners' argument on the merits is based on erroneous legal interpretations.

DISCUSSION AND CONCLUSIONS

The first of RLEA's propositions appears to be based on a misapprehension of the nature of a declaratory order. It seems beyond question that the Commission has the authority to issue declaratory opinions.[22] RLEA does

---

[20] 45 U.S.C. 151.

[21] Pursuant to our class exemption rules, 49 CFR 1150.31 *et seq.*, the CNW/FRVR exemption became effective December 30, seven days after filing. Petitioners indicated that they intend to defer consummation until the Commission responds to their petition for clarification. A related petition for exemption of a control relationship between FRVR and its parent corporation has also been filed.

[22] Pursuant to 5 U.S.C. 554(e), an administrative agency is empowered in its discretion to issue declaratory orders to terminate controversy or remove uncertainty.

not directly address this authority, arguing instead that the Interstate Commerce Act (ICA) does not vest this agency with the power "to decide the applicability and scope of other statutes"—that the "Commission is clearly not the tribunal to determine how to resolve conflicting mandates of the ICA and other statutes." That is true enough, if understood to mean that the Commission's opinions on statutory interpretation are, when challenged, subject to judicial review and possible override. There is no dispute over the fact of judicial primacy, but it does not follow that the Commission is foreclosed from expressing its viewpoint, or that such expression may not issue in declaratory form, when related to the discharge of explicit statutory power, such as the power to approve or exempt the sale of a line of railroad. There is no need to deprive private parties and reviewing courts of the benefit of a clear statement of the Commission's viewpoint. The reason for declaratory opinions is to aid in clarifying and resolving controversies.

A part of the present controversy that requires clarification is whether the Railway Labor Act must be accommodated (in RLEA's words, subordinated) to the Interstate Commerce Act in the circumstances of an approved or exempted line sale arising under section 10901 of the ICA. A related issue is the immunity from injunction under the Norris-LaGuardia Act of a strike that threatens to prevent the consummation of a transaction so approved or exempted.

Until quite recently, it had been an established rule that the orders of the Commission approving the merger, sale, or abandonment of a line of railroad were not subject to collateral attack in the courts, and could not be frustrated by employee actions taken under the aegis of the Railway Labor Act or otherwise.[23] "Congress did

---

[23] *Brotherhood of Locomotive Engineers* v. *C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

not intend employees have such power to block consolidations which are in the public interest." [24] However, in a recent Third Circuit proceeding, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Association*,[25] (*Lake Erie*), it has been held that a district court has no jurisdiction to enjoin a strike taken to block an ICC-approved sale. The Court based this holding on a finding that the Norris-LaGuardia Act need not be accommodated to the Interstate Commerce Act. This decision has had an immediate impact on the formation of small railroads,[26] threatening to halt the revitalization of the marginal railroad sectors—a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public.

In its opposition response, RLEA takes the position that the Third Circuit *Lake Erie* decision is correct,[27] and that the Commission should conclude that the Interstate Commerce Act does not supersede the Railway Labor Act or Norris-LaGuardia. RLEA argues that *Brotherhood of R.R. Trainmen* v. *Chicago River and Indiana R.R.*[28] (*Chicago River*) and *Boys Markets Inc.* v.

---

[24] *Missouri Pacific Railroad Company* v. *UTU*, 782 F.2d 107 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3209 (1987).

[25] No. 87-3664, Slip op., October 26, 1987.

[26] The *Lake Erie* decision has been followed by a Missouri federal district court, *Burlington Northern Railroad* v. *U.T.U.*, No. 86-5013, Slip op., October 26, 1987. (Missouri, Western District).

[27] The *Lake Erie* decision left open the issue of whether bargaining under the Railway Labor Act was necessary. The case was remanded to the district court on the RLA issue. The district court held the RLA applicable to the proposed sale and enjoined consummation of the transaction pending compliance with that act, finding that the Interstate Commerce Act does not operate to relieve the parties from their RLA obligations. *Railway Labor Executives' Assoc.* v. *Pittsburgh & Lake Erie Railroad*, No. 87-1745 Memorandum Opinion (Wes Dis. PA., No. 24, 1987). The case is back in the Third Circuit on appeal.

[28] 353 U.S. 30 (1957).

Retail Clerks Union[29] (*Boys Market*)—Supreme Court "accommodation" cases relied on by Petitioners—are not controlling since they do not address the Interstate Commerce Act, but are limited to situations where aspects of national labor statutes were in conflict.[30] Hence, RLEA is in agreement with the *Lake Erie* court that statutory preemption of the Norris-LaGuardia no-injunction principle is limited to the need to accommodate other *labor* statutes. Without conceding its legitimacy, RLEA recognizes certain precedent to the effect that ICC authorization of a transaction under the merger provisions (49 U.S.C. 11343) will automatically relieve a carrier from the necessity of compliance with the Railway Labor Act to the extent necessary to go forward with the approved transaction. However, RLEA argues that this precedent has no relevance to 49 U.S.C. 10901 line sales. Unlike line sales, merger-orders are provided explicit preemption authority in 49 U.S.C. 11341[31] and, as income protection and dispute resolution mechanisms are mandatory in merger proceedings,[32] labor is not "left out in the cold."[33] According to RLEA these are critical distinctions.

---

[29] 398 U.S. 235 (1970).

[30] Thus, in *Chicago River* an injunction against a strike was sustained where necessary to protect the Railway Labor Act's requirement that "minor" grievances be submitted to arbitration. In *Boys Markets* the court reached a similar conclusion under the Labor Management Relations Act.

[31] A carrier or corporation participating in a transaction approved or exempted by the Commission under subchapter III of Chapter 113 "is exempt from the antitrust laws and from all other laws . . . as necessary to let that person carry out the transaction . . ." By its terms, this section does not apply to line sales under Chapter 109.

[32] 49 U.S.C. 11347.

[33] RLEA cites to language in *Missouri Pacific R. Co.* v. *United Transportation Union* 782 F.2d 109 (8th Cir. 1986). This case held that a railroad is exempted under ICA Section 11341(a) from the Railway Labor Act in connection with a transaction approved under

The broad issue presented by the CNW-FRVA Petition and the RLEA Opposition reply is whether the Interstate Commerce Act preempts the Railway Labor Act to the extent necessary to allow the parties to consummate a transaction previously authorized by the Commission. Every court that had ruled on this precise issue prior to the *Lake Erie* decision had answered yes.[34] By so doing, courts have recognized the importance of this agency's role in reconciling the conflicts between public need for an efficient transportation system, (including the need for fair and equitable labor relations) and the private disputes that arise invariably from consolidations and restructurings within the rail system. The ICC has inherent powers to impose labor protection where necessary to ensure labor equity,[35] including the power to impose income guarantees and comprehensive schemes for alternative dispute resolution—mechanisms which may include notice, negotiation, a status quo requirement and arbitration. From the 1930's, when the ICC actively became involved in the administration of labor protection, Congress has routinely affirmed and expanded the importance of the Interstate Commerce Act as a part of the complex of laws governing labor relations in the rail

---

49 U.S.C. 11343. Labor emphasizes that the court there reasoned that inferring preemption of the RLA was reasonable because mandatory labor protection is applied 782 F.2d, at 112. There are chronological problems with placing such reliance on the reasoning. The preemption provision was first enacted in 1920, mandatory labor protection in 1940.

[34] *See Missouri Pacific R. Co.* v. *United Transportation Union, supra; Brotherhood of Locomotive Engineers* v. *C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). *Cf. ICC* v. *Locomotive Engineers*, 55 USLW 4771 (June 9, 1987) (Concurring Opinion of Justice Stevens, joined by Justices Brennan, Marshall and Blackmun).

[35] *United States* v. *Lowden*, 308 U.S. 225 (1939); *ICC* v. *Railway Labor Assn.*, 315 U.S. 373 (1942).

industry. The Transportation Act of 1940 [36] was a legislative affirmation of the Commission's authority to impose labor protection, mandating the use of labor protection in mergers and consolidations.[37] The Railroad Revitalization and Regulatory Reform Act of 1976 [38] mandated labor protection in trackage rights, lease transactions, and abandonments. The Staggers Rail Act of 1980 made labor protection mandatory in connection with the abolition of rate bureaus (Section 219 (g) and feeder line sales—section 401), as well as giving the Commission explicit discretion to impose protective conditions on reciprocal switching and on the construction of new rail lines. For more than fifty years the Commission has exercised its authority in this field, frequently at the request and with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period.

It is primarily due to the policy decision to withhold such protections taken in Ex Parte 392 (Sub-No. 1) (and in earlier individual proceedings) that the Commission's authority is under challenge. However, the Commission's policy determinations have been repeatedly sustained, and the existence of our jurisdiction may not hinge on the policy choice made.

In the first place, labor has not been left out in the cold. Affected parties were free to participate in the Ex Parte rulemaking, and are free to petition for its re-

---

[36] 54 Stat. 899.

[37] The *Lowden* court, while noting the pendency of the legislation which was to become the 1940 Act, concluded that the legislative initiatives did not militate against the conclusion that the Commission had implied power over labor protection in consolidations, but rather that Congress merely sought to make mandatory what was at the time discretionary. *United States* v. *Lowden, supra,* at 239.

[38] 90 Stat. 31.

opening. Indeed, aspects of the rulemaking are now under reconsideration in a reopened proceeding.[39] Further, in individual cases through the revocation process parties are given the opportunity to show that the policy norms of the Ex Parte rulemaking ought not apply. Full participation before the Commission is an important end in itself as it helps to inform the Commission of the range of problems and circumstances confronting transportation. If current policy does not provide routine protection, it is because experience has demonstrated that the formation of new lines would be thwarted, to the overall public detriment. Where exceptions are needed, the Commission has the authority to fashion a full remedy.

Jurisdiction is not determined by outcome. The Commission has exclusive and plenary jurisdiction over the sale, merger, or abandonment of rail lines.[40] This authority was granted by Congress as a part of a regulatory framework, to ensure a rail transportation system in the public interest. As a necessary component of this regulatory framework, the Commission has had to preempt on occasion the operation of other laws to the limited extent necessary to remove obstacles to Commission approved transactions. Such preemption of labor legislation has been upheld even in circumstances where the Commission did not provide labor protection under its auspices.[41] We believe this is the correct interpretation of the matter at issue.

The fact that a particular "labor outcome" does not dictate the extent or effect of ICC jurisdiction is a neces-

---

[39] *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, Notice of Proposed Rulemaking served October 2, 1987.

[40] *Brotherhood of Locomotive Engineers* v. *C&NW*, *supra*; *Chicago and North Western Transportation Co.* v. *Kalo Brick and Tile Co.*, 450 U.S. 311 (1981).

[41] *RLEA* v. *Staten Island Railroad Corp.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 927 (1987).

sary correlative to the Commission's discharge of its responsibilities. That the concern for labor equity is only one of many conflicting aspects of National Transportation Policy should not be seen as a derogation of the agency's authority—rather it is precisely the reason why the Interstate Commerce Act must be recognized to have preeminence. It is the public policy of this Nation to regulate and supervise transportation at the national level so as to ensure the essential benefits of a critical aspect of commerce. While the means of regulation have changed markedly over the decades, the exclusive and plenary nature of the Commission's jurisdiction over consolidations, sales and abandonment has been consistently upheld. In the discharge of our responsibilities, we are charged with the expert resolution of many-sided conflicts between disputants, public and private. The recitation above of the factors leading to our small-railroad policy illustrates the complexity of the process and information that led to our present policy.

As with all adversarial proceedings those which come before the Commission generate winners and losers, but it must also be clear that participants ought to, after exhausting lawful appeals aimed at our authority and reasonableness, be reconciled to the process. Allowing a dispersion of authority will compound the problems to the detriment of the public and the transportation system. In the matter at hand, it cannot be doubted that a strike to prevent ICC-approved abandonment is susceptible to injunction. But it is now contended that such a strike can be used to prevent the development of an advantageous alternative to abandonment, despite the fact that Commission jurisdiction over these types of restructuring is, in all relevant aspects, identical. Our expertise and experience, combined with our system-wide responsibilities, lead us to the conclusion that neither the public nor labor is adequately protected by encouraging a system that prefers abandonment to rejuvenation. We do not believe the law is so structured as to compel that outcome.

Organized as it is, FRVR stands a far better chance of developing a self-sustaining rail operation than does CNW. Over the past quarter century the miles of road operated by CNW has decreased by a third.[42] Its management goals include further reduction in size, either through line sales or abandonment. Whether the lines at issue here could be abandoned immediately under existing law has not been demonstrated. However, fierce trucking competition combined with CNW's comparative disadvantage in rail costs significantly increase the potential of future abandonment. Clearly, the National Transportation Policy will be advanced by permitting the sale of these lines to a willing, experienced and optimistic group of managers, who will in turn rely on experienced labor and a commitment to the local customer base in an attempt to revive and preserve competitive rail transportation for this region of Wisconsin.

This action will not significantly affect either the human environment or energy conservation.

It is ordered:

The Petition of CNW and FRVR for an order clarifying jurisdiction and other matters is granted.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Lamboley and Simmons. Commissioners Lamboley and Simmons dissented with separate expressions.

NORETA R. MCGEE
Secretary

(SEAL)

---

[42] *Moody's Transportation Manual* (1963 and 1987 issues indicates that CNW operated over 15 thousand miles of road in 1962 (including miles operated under contract and trackage rights) but that total had declined to slightly over 10 thousand miles by 1986.

COMMISSIONER SIMMONS, dissenting:

I would have denied the petition for clarification. I have supported the policy expressed by the majority because I believe it has contributed, to some extent, to the preservation of rail lines that otherwise would have been abandoned. However, I do not agree with the majority's use of such glowing terms to describe the efficacy of the Commission's denial of labor protection in so-called "short" line sales under 49 U.S.C. 10901. The language of the decision strongly implies that there can be virtually no valid justification for departure from this policy. Indeed, the decision to grant the petition for clarification and enter this declaratory order to enunciate a policy that has long been settled and affirmed in the courts indicates a certain lack of objectivity and fairness in the application of that policy.

We must not lose sight of our responsibility to weigh the interests of labor as a part of the public interest considerations associated with section 10901 sales. Neither this responsibility, nor the policy of which it is a part is enhanced by the gratuitous declaratory order entered here by the majority.

COMMISSIONER LAMBOLEY, dissenting:

While no one disputes the authority of the Commission to issue declaratory orders,[1] I believe to do so in this instance is an inappropriate use of process. In my view, there is insufficient evidence of controversy or uncertainty to warrant the issuance of this "clarifying" decision.

In invoking the class exemption process under Ex Parte No. 392 (Sub-No. 1)[2] petitioners have also requested

---

[1] 5 U.S.C. 554(e).

[2] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

that the agency declare that its authority under 49 U.S.C. 10901 supersedes the provisions of the Railway Labor Act (RLA[3] and the Norris-LaGuardia Act.[4] They do so because of an alleged "climate of uncertainty" which it is claimed impedes consummation of the proposed transaction. Upon closer examination it becomes evident that the alleged controversy or uncertainty results from judicial decisions as well as petitioner's own conduct, neither of which the declaratory order requested from this agency will necessarily resolve. Indeed, this order may well exacerbate matters not only for this case but for constructive activities in this forum on such issues in the future.

Petitioners argue such action is necessary because several recent court decisions[5] "reflects a misapplication of the accommodation doctrine and a misunderstanding of this Commission's role in addressing labor issues pertaining to transactions within its jurisdiction." The petitioners do not agree with the outcome of judicial action in which they did not participate, although the Commission did. Without more, the petitioners simply request that the Commission here render a "proper" interpretation of applicable law by declaratory order. Petitioners offer neither substantial reason nor purpose for their request as it may relate to judicial activity.

Additionally, the petitioners claim the Commission's declaratory order is necessary because, while the CNW has met with the rail unions and informal discussions

---

[3] 45 U.S.C. 151, *et seq.*

[4] 29 U.S.C. 101, *et seq.*

[5] *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R. Co.*, —— F.2d —— (No. 87-3664, 3rd Cir. October 26, 1987) (*P&LE I*) and *Railway Labor Executives' Association v. Pittsburgh and Lake Erie R. Co.*, Civil Action No. 87-1745 (W. D. Pa. Nov. 1987), appeal pending *sub nom. Railway Labor Executives' Ass'n v. Lake Erie Co.*, No. 87-3797 (3rd Cir. filed Nov. 25, 1987) (*P&LE II*).

have taken place, no agreements have been reached since the unions believe (apparently contrary to petitioners) that RLA procedures apply to such discussions. The petitioners do not explain why they simply do not file a request with the Commission to fashion and impose appropriate protective conditions, with post consummation negotiation and arbitraiton procedures, if need be. Such request for relief would squarely address alleged controversy or uncertainty concerns relating to the process and substance of negotiation.

In sum, neither judicial action nor voluntary conduct is sufficient premise upon which to establish controversy or uncertainty as cause for declaratory relief in this case.

Further, quite apart from the lack of any legitimate, demonstrable need for declaratory relief, I fail to see that this order makes any significant contribution toward resolution of statutory "accommodation" issues. There is little doubt that the Commission does not have the requisite *jurisdiction* to interpret the applicability and scope of statutes other than the ICA. Certainly the agency may "express its viewpoint". Such as it is. It is a position which has been expressed repeatedly in court briefs[6] submitted by the Commission, and is well known. This decision appears to be little more than an attempt to supplement arguments in briefs previously filed and bolster prior discussion in Ex Parte No. 392 (Sub-No. 1).[7] It is self-serving and offers no new instruction.

Moreover, of particular concern here, is the eagerness to justify a well known position, the effect of which places the Commission in the position of apparent bias. This is especially true here because, in addition to the extended

---

[6] See for example the Commission's brief in *P&LE II*, also a letter to District Judge dated October 8, 1987.

[7] Ex Parte No. 392 (Sub-No. 1), *Class Exemption for Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985).

discussion of the Ex Parte No. 392 (Sub-No. 1) and preemption matters, this decision addresses specific employment security and displacement issues in this transaction, and consequently, in anticipatory fashion, effectively prejudices and precludes meaningful consideration of any subsequent petition for revocation raising protective condition issues. The lack of agency constraint here has unfortunate ramifications.

Finally, after all things are considered, it is fair to say that any instability or uncertainty over employment security and displacement issues is largely a consequence of our own doing by decisions such as this, as well as those in Ex Parte No. 392 (Sub-No. 1) and its progeny. Legitimate transportation transactions under the ICA have been authorized in a manner which encourages and permits unilateral abrogation of legitimate, collective bargaining agreements and statutory requirements of the RLA, without procedural or substantive accommodation of respective interests. Mutuality and reciprocity in collective bargaining contemplated by the RLA and resultant market-based arrangements have been nullified by our approach. It is small wonder than that the incentives for problem solving and dispute resolution through the negotiation process have been diminished and relations have become unstable.

It has become abundantly clear in these cases that the essence of the dispute is labor relations issues, not transportation.[8] Assuming jurisdiction, the Commission's current fixed position prevents adjustment and resolution in this forum.

---

[8] See, also letter dated December 2, 1987 in Finance Docket No. 31163, *Winoma Bridge Railroad Company Trackage Rights—Burlington Northern Railroad Company.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

September 8, 1988

Before

HON. HARLINGTON WOOD, JR., Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge
HON. JESSE E. ESCHBACH, Senior Circuit Judge

No. 88-1504

CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY,
Plaintiffs-Appellees,

vs.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

Paul E. Plunkett, Judge—No. 88 C 444

ORDER

This matter comes before the Court on the following documents:

"EMERGENCY MOTION BY APPELLANTS FOR A STAY OF THE STRIKE INJUNCTION OR, ALTERNATIVELY, FOR AN INJUNCTION TO PROHIBIT THE SALE PENDING PETITION FOR A WRIT OF CERTIORARI" filed by defendants-appellants on September 2, 1988.

"OPPOSITION OF APPELLEES C&NW AND FRVR TO APPELLANTS' EMERGENCY MOTION OR A STAY OF THE STRIKE INJUNCTION OR FOR AN INJUNCTION TO PROHIBIT THE LINE SALE PENDING PETITION FOR A WRIT OF CERTIORARI" filed by plaintiffs-appellees on September 7, 1988.

Rule 44.2 of the Supreme Court's Rules allows a party to file a motion to stay the enforcement of the judgment for which review is being sought in the Supreme Court. The factors regulating issuance of a stay pending appeal are: 1. whether the stay applicant has made a strong showing of likelihood of success on the merits; 2. whether the applicant will suffer irreparable harm in the absence of the stay; 3. whether a stay will substantially harm other parties to the proceedings; and 4. where the public interest lies. *Hilton v. Braunskill*, —— U.S. ——, 107 S. Ct. 2133 (1987). In this case, appellants must also make a substantial showing that their petition for certiorari will raise an important question meriting review by the Supreme Court and likely to garner the votes of four justices in favor of granting certiorari.

Appellants argue that the Supreme Court is likely to grant their petition for certiorari because it has done so in other railroad line cases currently pending before the Supreme Court. Those cases, however, do not involve a claim by the carrier, that its actions in abolishing jobs were permitted under existing labor agreements. *See Chicago and Northwestern Transportation Co. v. Railway Labor Executives Assoc.*, No. 88-1504, slip op. at

13-14, and 16-17 n.3 (7th Cir., Aug. 23, 1988). Accordingly, we find that appellants' arguments, which have already been rejected by the district court and this court, are unlikely to win Supreme Court review, and thus are not likely to succeed on the merits. In addition, appellees would suffer substantial hardship if a stay were imposed, as further delay could jeopardize the proposed sale. In contrast, we have already held that the sale will not irreparably harm appellants as it involves the sale by C.&N.W. "of a small portion of its track while maintaining the remainder of its rail operations and continuing to honor its collective bargaining agreements." Slip op. at 17, n.3. Finally, the public interest lays, in this case, in promoting the finality of judgments.

Accordingly, upon careful review of the pleadings filed in support of this motion, as well as the briefs and arguments already considered by the court, and in light of this court's opinion of August 23, 1988,

IT IS ORDERED that the EMERGENCY MOTION BY APPELLANTS FOR A STAY OF THE STRIKE INJUNCTION OR, ALTERNATIVELY, FOR AN INJUNCTION TO PROHIBIT THE SALE PENDING PETITION FOR A WRIT OF CERTIORARI is DENIED.

APPENDIX C

United States Court of Appeals Decisions Applying "Arguable" Standard for Identifying Minor Disputes in Status Quo and Strike Cases

D.C. Circuit:

Air Line Pilots Ass'n v. *Eastern Air Lines*, Nos. 88-7201—88-7204 (D.C. Cir. Sept. 30, 1988)

International Bhd. of Elec. Wkrs. v. *Washington Terminal Co.*, 473 F.2d 1156, 1172 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 906 (1973)

Southern Ry. v. *Brotherhood of Loc. Firemen & Enginemen*, 384 F.2d 323, 327 (D.C. Cir. 1967)

First Circuit:

RLEA v. *Boston & Maine Corp.*, 808 F.2d 150, 159 (1st Cir. 1986), *cert. denied*, 108 S. Ct. 102 (1987)

Maine Central R.R. v. *United Transp. Union*, 787 F.2d 780, 783 (1st Cir.), *cert. denied*, 479 U.S. 848 (1986)

Brotherhood of Loc. Engineers v. *Boston & Maine Corp.*, 788 F.2d 794, 798 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986)

Carbone v. *Meserve*, 645 F.2d 96, 98-99 (1st Cir.), *cert. denied*, 454 U.S. 859 (1981)

Airlines Stewards and Stewardesses Ass'n v. *Caribbean Atlantic Airlines*, 412 F.2d 289, 291 (1st Cir. 1969)

Second Circuit:

Baylis v. *Marriott Corp.*, 843 F.2d 658, 663 (2d Cir. 1988)

Air Line Pilots Ass'n v. *Trans World Airlines*, 713 F.2d 940, 948 (2d Cir. 1983), *rev'd on other grounds*, 469 U.S. 111 (1985)

Local 553, Transport Workers v. *Eastern Air Lines*, 695 F.2d 668, 673 (2d Cir. 1982)

Rutland Ry. v. *Brotherhood of Loc. Engineers*, 307 F.2d 21, 36 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963)

Third Circuit:

RLEA v. *Consolidated Rail Corp.*, 845 F.2d 1187, 1190-91 (3d Cir.), *cert. granted*, No. 88-1 (Oct. 3, 1988)

Goclowski v. *Penn Central Transp. Co.*, 571 F.2d 747, 755 n.11 (3d Cir. 1977)

United Transp. Union v. *Penn Central Transp. Co.*, 505 F.2d 542, 544 (3d Cir. 1974)

Fourth Circuit:

Dement v. *Richmond, F. & P. R.R.*, 845 F.2d 451, 463 (4th Cir. 1988)

Kushto v. *Brotherhood of Ry., Airline & S.S. Clerks*, 818 F.2d 290, 293 (4th Cir. 1987)

Norfolk & P.B.L. R.R. v. *Brotherhood of R.R. Trainmen*, 248 F.2d 34, 43 n.4 (4th Cir.), *cert. denied*, 355 U.S. 914 (1958)

Fifth Circuit:

International Bhd. of Teamsters v. *Southwest Airlines*, 842 F.2d 794, 803 (5th Cir. 1988), *rehearing en banc pending*

St. L. S.W. Ry. v. *United Transp. Union*, 646 F.2d 230, 233 (5th Cir. 1981)

Ruby v. *TACA Int'l Airlines*, 439 F.2d 1359, 1363 (5th Cir. 1971)

Railway Express Agency, Inc. v. *Brotherhood of Ry., Airline & S.S. Clerks*, 437 F.2d 388, 392 (5th Cir.), *cert. denied*, 403 U.S. 919 (1972)

International Bhd. of Teamsters v. *Braniff Int'l Airways*, 437 F.2d 1272, 1274 (5th Cir. 1971)

United Indus. Workers v. *Galveston Wharves*, 351 F.2d 183, 188 (5th Cir. 1965)

St. L., S.F. & T. Ry. v. *Railroad Yardmasters of America*, 328 F.2d 749, 753 (5th Cir.), *cert. denied*, 377 U.S. 980 (1964)

Sixth Circuit:

Brotherhood of Loc. Engineers v. *Consolidated Rail Corp.*, 844 F.2d 1218, 1221 (6th Cir. 1984)

Brotherhood Ry. Carmen v. *Norfolk & W. Ry.*, 745 F.2d 370, 375 (6th Cir. 1984)

United Transp. Union v. *Baker*, 482 F.2d 228, 230 (6th Cir. 1973)

Seventh Circuit:

Brotherhood of Ry., Airline & S.S. Clerks v. *Atchison, Topeka & Santa Fe Ry.*, 847 F.2d 403, 406 (7th Cir. 1988)

RLEA v. *Norfolk & W. Ry.*, 833 F.2d 700, 704 (7th Cir. 1987)

National Ry. Labor Conference v. *International Ass'n of Machinists*, 830 F.2d 741, 746 (7th Cir. 1987)

Chicago & N.W. Transp. Co. v. *International Bhd. of Elec. Wkrs.*, 829 F.2d 1424, 1429 (7th Cir. 1987)

Brotherhood of R.R. Signalmen v. *Burlington Northern R.R.*, 829 F.2d 617, 619 (7th Cir. 1987)

Atchison, T. & S.F. Ry. v. *United Transp. Union*, 734 F.2d 317, 321 (7th Cir. 1984)

Chicago & N.W. Transp. Co. v. *United Transp. Union*, 656 F.2d 274, 278-79 (7th Cir. 1981)

United Transp. Union v. *Baker*, 499 F.2d 727, 730 (7th Cir.), *cert. denied*, 419 U.S. 839 (1974)

Eighth Circuit:

International Ass'n of Machinists v. *Soo Line R.R.*, 850 F.2d 368, 376 (8th Cir. 1988) (*en banc*)

Brotherhood Ry. Carmen v. *Alton & S. Ry.*, 849 F.2d 1111, 1114 (8th Cir. 1988)

International Ass'n of Machinists v. *Northwest Airlines*, 843 F.2d 1119, 1122-23 (8th Cir.), *vacated as moot*, (August 4, 1988)

Brotherhood of Maintenance of Way Employees v. *Chicago & N.W. Transp. Co.*, 827 F.2d 330, 333 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1291 (1988)

Brotherhood of Maintenance of Way Employees v. *Burlington Northern R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986)

Independent Fed'n of Flight Attendants v. *Trans World Airlines*, 655 F.2d 155, 158-59 (8th Cir. 1981)

United Transp. Union v. *Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972)

Northwest Airlines, Inc. v. *Air Line Pilots Ass'n*, 442 F.2d 246, 248-49 (8th Cir. 1970)

Ninth Circuit:

Brotherhood of Loc. Engineers v. *Burlington Northern R.R.*, 838 F.2d 1102, 1105 (9th Cir. 1988)

Brotherhood of Loc. Engineers v. *Burlington Northern R.R.*, 838 F.2d 1087, 1091 (9th Cir. 1988), *petition for certiorari pending*, No. 87-1631

IBTCWHA, Local Union No. 2707 v. *Western Air Lines*, 813 F.2d 1359, 1362 (9th Cir.), *vacated and remanded for consideration of mootness*, 108 S. Ct. 53 (1987)

Brotherhood of Ry. Carmen v. *Pacific Fruit Express Co.*, 651 F.2d 651, 652 (9th Cir. 1981)

Southern Pacific Transp. Co. v. *United Transp. Union*, 491 F.2d 830, 833 (9th Cir.), *cert. denied*, 416 U.S. 985 (1974)

Switchmen's Union of North America v. *Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968)